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ZAFARI MD YUNUS v. PP

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[CRIMINAL APPLICATION NO: AA-43-2-02-2017]
25 APRIL 2017

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CRIMINAL PROCEDURE: *Revision – Remand order – Whether there were valid grounds for remand order to be granted – Whether investigation carried out prior to granting of remand order – Whether there was evidence linking applicant to police report – Whether s. 117 of Criminal Procedure Code complied with*

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The applicant was arrested following a police report that an unknown person had used a hand phone to record the complainant bathing. He was brought before the Magistrate to be remanded under s. 117 of the Criminal Procedure Code ('the CPC'). In the remand application, the investigating officer ('the IO') requested that the applicant be remanded for four days. The Magistrate granted the remand application. In this application, the applicant sought revision of the remand order under s. 323 of the CPC, submitting that (i) there were no valid grounds for him to be remanded as there was no evidence at the time of the application to link the applicant with the police report; and (ii) there was a breach of s. 117 of the CPC which rendered the remand unlawful. The prosecution argued that the order was lawful as the Magistrate had the legal authority to make such order. The issues at hand were (i) whether the remand order was made with sufficient cause; and (ii) whether s. 117 of the CPC was complied with.

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Held (allowing application; setting aside remand order):

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(1) The reasons the remand application was made were general. The facts stated in the remand application did not link the applicant to the alleged offence. Upon scrutiny of ss. 117 and 119 of the CPC, one would envisage some form of investigation having taken place, *albeit* preliminary, before 'any person is arrested and detained in custody'. A perusal of the remand application gave a contrary impression. There was nothing reflected in the remand application in the form of an investigation to give the Magistrate reasonable basis for a remand order to be issued against the applicant. (paras 9, 11 & 13)

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(2) There was a serious non-compliance with s. 117 of the CPC, in particular sub-ss. (1) and (4), which rendered the remand order unlawful. Based on the record of proceedings, the IO did not transmit to the Magistrate a copy of the entries in a diary as required in s. 117(1) of the CPC. The remand application could not be said to be the 'diary' contemplated under ss. 117(1) and 119(1) of the CPC. The non-

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production of the investigation diary would have deprived the Magistrate of taking into consideration any period of detention, if any, immediately prior to the remand application. It was mandatory for him to do so under s. 117(4) of the CPC. Therefore, the Magistrate had not considered an important factor which he ought to have considered in his decision to further the remand. (paras 20, 21 & 23)

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Case(s) referred to:

Ketua Polis Daerah Johor Bahru, Johor & Ors v. Ngui Tek Choi [2013] 4 CLJ 47 CA (refd)

Leonard Teoh Hooi Leong v. PP [2012] 10 CLJ 104 CA (refd)

Mohd Hady Ya'akop v. Hassan Marsom & Ors [2017] 6 CLJ 487 CA (refd)

PP v. Audrey Keong Mei Cheng [1997] 4 CLJ 702 CA (refd)

PP v. Rajisegar Munisamy [2006] 1 CLJ 217 CA (refd)

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Legislation referred to:

Criminal Procedure Code, ss. 117(1), (4), 119(1), 323(1), 325

For the applicant - *Vernal & Kala Malar; M/s Kula & Assocs*

For the respondent - *Harris Ong Mohd Jeffrey Ong; DPP*

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Reported by Najib Tamby

JUDGMENT

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Anselm Charles Fernandis JC:**Introduction**

[1] This matter was brought to this court's attention by virtue of a letter from the applicant's solicitors dated 27 January 2017. Briefly the letter complained that the remand of the applicant, one Zafari bin Md Yunus was based on false allegations in a police report. This was due to a feud between him and the complainant. It was also stated in the said letter that the applicant's statement was only recorded once in the four days he was under remand. He was remanded from 22 December 2016 to 25 December 2016. The applicant applied to the High Court to revise the remand order under s. 323 of the Criminal Procedure Code (CPC) stating that there were no valid grounds for the applicant to be remanded in the first place. This court then called for the record of proceedings in accordance with s. 323(1) CPC.

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Background Facts

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[2] The pertinent facts leading to the remand of the applicant are as follows:

- a) A police report was lodged by the complainant stating that an unknown person had used a hand phone to record her bathing. This alleged incident occurred on 29 November 2016 and the said report was lodged

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- A the following day. Based on this report, the applicant was arrested on the 21 December 2016. On 22 December 2016, he was brought to the Magistrate to be remanded under s. 117 CPC.
- B b) The investigating officer (IO) made the remand application by way of a type written letter signed by him entitled “MOHON PERINTAH REMAN DIBAWAH SEK 117 KPJ” (the remand application). In it the IO requested that the applicant be remanded for four days, that is, from 22 December 2016 to 25 December 2016. The reasons for the remand were stated as:
- C i. Merakam percakapan 112 OYDS.
ii. Mengambil gambar dan cap jari.
iii. Merakam percakapan risikan ke atas OYDS.
iv. Membuat siasatan mengenai penglibatan OYDS dalam kes ini.
- D The notes for the remand proceedings were handwritten in what appeared to be a standard form headed “Minit Permohonan Reman Di Bawah s. 117 Kanun Tatacara Jenayah” (the form) and was signed by the Magistrate. A fully typewritten transcript of the same with the heading “lampiran A” (the typewritten transcript) was also made available. All three documents formed the record of the proceedings
- E which was forwarded to this court.

Scope Of s. 325 CPC

- F [3] In exercising my powers under s. 325 CPC, I had to satisfy myself as to the “correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the inferior court”. I then would have to examine the record of the proceedings of which had been called for. In exercising this discretion, I confined myself only to the record of the proceedings and nothing else. *PP v. Audrey Keong Mei Cheng* [1997] 4 CLJ 702 CA at p 709.
- G [4] From the onset, I would therefore make it clear that this proceeding is only concerned with the lawfulness of the remand order.

Submission By Parties

- H [5] The learned DPP submitted that the order granted by the Magistrate was a lawful order as the Magistrate had the legal authority to make such an order. In other words, it was part of a Judicial Act. Learned counsel for the applicant on the other had argued that the remand order was made without any basis as there was no evidence at the time of the application to link the applicant with the said police report. Counsel also submitted that there was
- I a breach of s. 117 CPC which rendered the remand unlawful.

Issues To Consider

[6] In determining whether the remand order was lawful or not I would have to address myself as to whether it was made either without sufficient cause being placed before the Magistrate or against the provisions of s. 117 of the CPC.

[7] On the point raised by the learned DPP it is my opinion that although it is clear that the remand order is the result of an act of judicial authority this court can determine the legality or propriety of the remand order. In fact, the very lawfulness of the order is being challenged here.

[8] This issue was considered in the Court of Appeal in the case of *Ketua Polis Daerah Johor Bahru, Johor & Ors v. Ngui Tek Choi* [2013] 4 MLJ 504; [2013] 4 CLJ 47 where it was clearly stated:

Since the issue of a remand order under s. 117 of the CPC was an exercise of a Magistrate's criminal jurisdiction, the relevant High Court which has the jurisdiction to set aside the order is a High Court exercising its criminal, appellate or revision power under the CPC and the Courts of Judicature Act 1964.

Was The Remand Made Without Sufficient Cause Before The Magistrate?

[9] The reasons for the remand application are as stated in para. 2(b) above. There were no other reasons stated for the applicant to be remanded. On seeing how general the reasons were couched in, one cannot help having the impression that there was no investigation done before the remand application was made. Indeed, there was nothing in the record of proceedings to indicate this. The Court of Appeal had recently considered the question of whether there was sufficient cause for issuing a remand order. In the case of *Mohd Hady Ya'akop v. Hassan Marsom & Ors* [2017] 6 CLJ 487; [2016] 4 MLJ 141 at p. 496 (CLJ); p. 150 (MLJ) the Court of Appeal commented:

It was undeniable that there were two remand orders issued under s. 117 of the CPC which covered the whole period of the appellant's detention in police custody, and arguably legitimised the appellant's detention. *The crucial question however, in our minds, was whether those remand orders had been obtained from the Magistrate(s) upon sufficient cause being shown or whether the judicial officers concerned had been misled in issuing the remand orders when there were no well-founded grounds to secure those orders in the first place.* (emphasis added)

[10] In the above case the Court of Appeal was considering whether the Magistrate was misled in granting the remand order. It is this court's view that in considering whether there were "well founded grounds" for a remand order to be made I could also consider the absence or lack of such grounds.

- A [11] On scrutinising ss. 117 and 119 CPC one would envisage some form of investigation having taken place, albeit preliminary, before “any person is arrested and detained in custody”. A perusal of the remand application in this case however gives a contrary impression. Such investigation, if carried out, would have formed a basis for the Magistrate to grant a remand if investigations cannot be completed within 24 hours.
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[12] Sections 117 and 119 of the CPC, in so far as is material for determination of the issue at hand is reproduced below:

117: Procedure where investigation cannot be completed within twenty-four hours.

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- (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.
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- (2) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, authorize the detention of the accused in such custody as follows:
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- (a) ...
- (b) ...
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- (3) The officer making the investigation shall state in the copy of the entries in the diary referred to in subsection (1), any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application.
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- (4) The Magistrate, in deciding the period of detention of the accused person, shall take into consideration any detention period immediately prior to the application, whether or not such detention relates to the application
- (5) ...
- (6) ...
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- (7) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing. (emphasis added)

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119: Diary of proceedings in investigation:

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(1) Every police officer making a police investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth-

(a) the time at which the order, if any, for investigation reached him;

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(b) the time at which he began and closed the investigation;

(c) the place or places visited by him; and

(d) a statement of the circumstances ascertained through his investigation.

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(2) ...

[13] I find the facts as stated in the remand application did not link the applicant to the alleged offence. Part of the police report seemed to have been inserted in the remand application where the complainant herself said “ada seorang yang tidak saya kenali telah merakam gambar saya”. In other words, there was nothing reflected in the remand application in the form of an investigation to give the Magistrate reasonable basis for a remand order to be issued against the applicant.

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[14] In determining what was necessary to be done by an investigating officer to enable a Magistrate to exercise his powers to grant a remand order, I can do no better than to state what was said in the case of *Mohd Hady bin Ya'akop v. Hassan bin Marsom & Ors* [2017] 6 CLJ 487; [2016] 4 MLJ 141 at p. 501 (CLJ); p. 155 (MLJ).

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What could be drawn from the above discussion was that a police officer applying for a remand (detention order for further investigation) had a duty to satisfy the Magistrate that there were grounds for believing based on credible information that the person arrested was involved in a criminal offence and such investigation could not be completed within twenty four hours; the accusations must be well-founded. What this meant in other words, was that it was the responsibility of such police officer to produce to the Magistrate sufficient material that would pass an objective test to show at least the existence of a reasonable basis for the alleged suspicion to justify the remand order to be issued by the Magistrate. The entries in the police diaries that had to be produced when applying for the remand order or extension should also advert to the stage and developments in the investigation under way to support the sufficient cause upon which the Magistrate would thereupon have to make the far reaching decision to deny one's liberty for that limited period.

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A [15] Based on the records, I find that there was a dearth of information or grounds for the Magistrate to have exercised his discretion in a meaningful and informative manner when making the remand order. The Magistrate gave the remand order of four days even though there was an absence of “credible information that the person arrested was involved in a criminal offence”.

B [16] In this context one must appreciate what the Court of Appeal stated in *PP v. Rajisegar Munisamy* [2006] 1 CLJ 217; [2006] 2 MLJ 43, that:

C ... a Magistrate who is called upon to exercise his power under s. 117 must act cautiously and with circumspection. The Magistrate must not accept *ipsi dixit* of the police officer requesting the remand. The Magistrate must anxiously scrutinize the material that is produced and record his reasons for making the order.

D [17] The mechanical fashion in which the remand was given is evident in the typewritten transcript para. 5, where the Magistrate merely stated the reasons for granting the remand as:

OYDS ditahan 4 hari daripada 22/12/16 sehingga 25/12/16 atas alasan permohonan di para 2 dilokap IPD Batu Gajah.

E [18] “Para 2” merely repeat word for word the reasons given in the remand application. It is noted however, for some reason or other, the words “para 2” and “IPD Batu Gajah” were not noted down in the form which, it would be fair to assume, is the contemporaneous notes of the proceedings.

[19] Now to the other issue on whether s. 117 was complied with.

F **Were The Provisions Of s. 117 CPC Complied With?**

G [20] The most obvious omission as can be discerned from the record of proceedings is that the IO did not transmit to the Magistrate a copy of the entries in a diary as required in s. 117(1) CPC. As stated earlier the remand application consisted of a sheet of paper in the form of a letter. There were no entries such as those required by s. 119 CPC. I am of the considered view that this by itself would render the remand unlawful. The remand application in this case could not, by any stretch of the imagination, be said to be the “diary” contemplated under s. 117(1) CPC and s. 119(1) CPC. There are a number of cases on this point but I need only to mention case of *Leonard Teoh Hooi Leong v. PP* [2012] 10 CLJ 104; [2010] 3 MLJ 373 where Court of Appeal in considering whether the detention of the appellant was lawful stated:

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In *Re the detention of R Sivarasa & Ors* KC Vohrah J (as he then was) held that the failure to transmit to the Magistrate a copy of the entries was fatal to the application before the Magistrate as it meant that the Magistrate did not have the prescribed material to act upon her judicial enquiry whether to order for further remand. Similarly, in *Public Prosecutor v. Audrey Keong Mei Cheng*, Shaikh Daud JCA held that since the police failed to produce a copy of the diary as prescribed by s 119 of the CPC, the registrar was right to refuse to order further detention of the respondent.

We endorse the above views.

[21] Further to this the non-production of the investigation diary would have deprived the Magistrate of taking into consideration any period of detention, if any, immediately prior to the remand application. It was mandatory for him to do so under s. 117(4). The Magistrate had therefore not considered an important factor which he ought to have considered in his decision to further the remand. This section together with sub-ss. (2), (3) and (5) were inserted by the Criminal Procedure Code (Amendment) Act 2006. In general, the amendments put in place stricter requirements for the period and conditions of remand and for the officer making the application to specifically state in the diary whether the accused has been previously detained.

[22] It cannot be denied that s. 117 is an important tool for the enforcement agency. The work of the IO would be greatly hampered without it. Parliament, however, had in all its wisdom passed laws to ensure the rights of the person detained are protected. On the other hand, the manner these laws are administered must not be such as to delay or hinder the progress of an investigation. A magistrate in determining a remand application has to balance the right to liberty of an individual and the imposition of laws that limit his liberty but are crucial for the investigation and detection of crime. In this, the magistrate must ensure that every granting or refusal of a remand application is justifiable and in accordance with the law.

Conclusion

[23] After listening to the submissions and going through the record of proceedings, I find that there was insufficient cause for the Magistrate to grant the remand order. There was also serious non-compliance with s. 117 CPC, in particular to sub-ss. (1) and (4) which rendered the remand order unlawful.

[24] The application for revision is therefore allowed and the remand order set aside.

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